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UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

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IN THE MATTER OF:                    )  
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DETERMINATION OF RATES            ) Docket No.  
AND TERMS FOR MAKING AND        ) 16-CRB-0003-PR  
DISTRIBUTING PHONORECORDS        ) (2018-2022)  
(PHONORECORDS III),                )  
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CONDENSED TRANSCRIPT WITH KEYWORD INDEX

OPEN SESSIONS

Pages: 5473 through 5670 (with excerpts)

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<p style="text-align: right;">5473</p> <p>1 UNITED STATES COPYRIGHT ROYALTY JUDGES 2 The Library of Congress 3 -----X 4 IN THE MATTER OF: ) 5 ) 6 DETERMINATION OF RATES ) Docket No. 7 AND TERMS FOR MAKING AND ) 16-CRB-0003-PR 8 DISTRIBUTING PHONORECORDS) (2018-2022) 9 (PHONORECORDS III), ) 10 -----X 11 BEFORE: THE HONORABLE SUZANNE BARNETT 12 THE HONORABLE JESSE M. FEDER 13 THE HONORABLE DAVID R. STRICKLER 14 Copyright Royalty Judges 15 16 Library of Congress 17 Madison Building 18 101 Independence Avenue, S.E. 19 Washington, D.C. 20 21 April 7, 2017 22 9:08 a.m. 23 VOLUME XIX 24 Reported by: 25 Karen Brynteson, RMR, CRR, FAPR</p>	<p style="text-align: right;">5475</p> <p>1 APPEARANCES (Continued): 2 Counsel for Pandora Media, Inc.: 3 PETER D. ISAKOFF, ESQ. 4 Weil Gotshal &amp; Manges, LLP 5 1900 Eye Street, N.W. 6 Suite 900 7 Washington, D.C. 20005 8 202-882-7155 9 10 BENJAMIN E. MARKS, ESQ. 11 JENNIFER RAMOS, ESQ. 12 JACOB B. EBIN, ESQ. 13 Weil, Gotshal &amp; Manges, LLP 14 767 Fifth Avenue 15 New York, New York 10153-0119 16 212-310-8029 17 18 DAVID SINGH, ESQ. 19 HONG-AN TRAN, ESQ. 20 Weil, Gotshal &amp; Manges LLP 21 201 Redwood Shores Parkway 22 Redwood Shores, CA 94065 23 650-802-3000 24 25</p>
<p style="text-align: right;">5474</p> <p>1 A P P E A R A N C E S: 2 Counsel for National Music Publishers Association, 3 Nashville Songwriters Association International: 4 DONALD ZAKARIN, ESQ. 5 BENJAMIN K. SEMEL, ESQ. 6 FRANK SCIBILIA, ESQ. 7 LISA M. BUCKLEY, ESQ. 8 JAMES A. JANOWITZ, ESQ. 9 JOSH WEIGENSBERG, ESQ. 10 MARION HARRIS, ESQ. 11 WILLIAM L. CHARRON, ESQ. 12 ALEX GOLDBERG, ESQ. 13 Pryor Cashman, LLP 14 Seven Times Square 15 New York, New York 10036 16 212-421-4100 17 18 Counsel for Apple Music, Inc.: 19 MARY MAZZELLO, ESQ. 20 Kirkland &amp; Ellis, LLP 21 601 Lexington Avenue 22 New York, New York 10022 23 24 25</p>	<p style="text-align: right;">5476</p> <p>1 APPEARANCES (Continued): 2 Counsel for Spotify USA, Inc.: 3 A. JOHN P. MANCINI, ESQ. 4 XIYIN TANG, ESQ. 5 Mayer Brown LLP 6 1221 Avenue of the Americas 7 New York, New York 10020 8 212-506-2295 9 10 RICHARD M. ASSMUS, ESQ. 11 KRISTINE M. YOUNG, ESQ. 12 Mayer Brown LLP 13 71 S. Wacker Drive 14 Chicago, Illinois 60606 15 312-782-0600 16 17 PETER O. SCHMIDT, ESQ. 18 ANITA Y. LAM, ESQ. 19 Mayer Brown LLP 20 1999 K Street, N.W. 21 Washington, D.C. 20006 22 202-263-3000 23 24 25</p>

<p style="text-align: right;">5477</p> <p>1 APPEARANCES (Continued):</p> <p>2 Counsel for Amazon Prime Music:</p> <p>3 MICHAEL S. ELKIN, ESQ.</p> <p>4 THOMAS PATRICK LANE, ESQ.</p> <p>5 DANIEL N. GUISBOND, ESQ.</p> <p>6 STACEY FOLTZ STARK, ESQ.</p> <p>7 SCOTT M. AHMAD, ESQ.</p> <p>8 SCOTT R. SAMAY, ESQ.</p> <p>9 JENNIFER GOLINVEAUX, ESQ.</p> <p>10 Winston &amp; Strawn, LLP</p> <p>11 200 Park Avenue</p> <p>12 New York, New York 10166</p> <p>13 212-294-6700</p> <p>14</p> <p>15 Counsel for Google, Inc.:</p> <p>16 KENNETH STEINTHAL, ESQ.</p> <p>17 JOSEPH WETZEL, ESQ.</p> <p>18 DAVID P. MATTERN, ESQ.</p> <p>19 KATHERINE E. MERK, ESQ.</p> <p>20 JASON BLAKE CUNNINGHAM, ESQ.</p> <p>21 King &amp; Spalding, LLP</p> <p>22 101 Second Street, Suite 2300</p> <p>23 San Francisco, CA 94105</p> <p>24 415-318-1211</p> <p>25</p>	<p style="text-align: right;">5479</p> <p>1 A. I'm Leslie Marx. I'm a professor at Duke</p> <p>2 University, and I spoke to you about my written</p> <p>3 direct testimony earlier.</p> <p>4 MR. ASSMUS: And I'd remind the Panel</p> <p>5 that Dr. Marx was previously qualified as an expert</p> <p>6 in economics and industrial organization.</p> <p>7 JUDGE BARNETT: Yes, thank you.</p> <p>8 BY MR. ASSMUS:</p> <p>9 Q. You should have in front of you, and the</p> <p>10 Panel will have shortly, a binder. And the first</p> <p>11 tab of that binder is Spotify Trial Exhibit 1069.</p> <p>12 Could you turn to it?</p> <p>13 A. I see that.</p> <p>14 Q. And could you tell the Court what that</p> <p>15 is?</p> <p>16 A. This is my written rebuttal testimony.</p> <p>17 JUDGE STRICKLER: We have those binders.</p> <p>18 MR. ASSMUS: You do?</p> <p>19 JUDGE STRICKLER: Yes.</p> <p>20 MS. ASSMUS: Okay, perfect.</p> <p>21 BY MR. ASSMUS:</p> <p>22 Q. Could you turn to the page immediately</p> <p>23 following numbered page 91?</p> <p>24 A. Yes.</p> <p>25 Q. And is that your signature?</p>
<p style="text-align: right;">5478</p> <p>1 PROCEEDINGS</p> <p>2 (9:08 a.m.)</p> <p>3 JUDGE BARNETT: Housekeeping? We have</p> <p>4 studied our calendar and all of the pieces of the</p> <p>5 puzzle, and could hear closing arguments in this</p> <p>6 case on the 8th of June. If that turns out to be</p> <p>7 the subject of irreconcilable calendar problems, we</p> <p>8 have the 6th or the 7th. And if none of those days</p> <p>9 work, let us know. Thank you.</p> <p>10 MR. ASSMUS: Your Honors, Spotify recalls</p> <p>11 Dr. Leslie Marx.</p> <p>12 JUDGE BARNETT: Thank you. Good morning.</p> <p>13 You remain under oath, Dr. Marx.</p> <p>14 THE WITNESS: Thank you.</p> <p>15 Whereupon--</p> <p>16 LESLIE MARX</p> <p>17 a witness, called for examination, having previously</p> <p>18 been duly sworn, was examined and testified further</p> <p>19 as follows:</p> <p>20 DIRECT EXAMINATION</p> <p>21 BY MR. ASSMUS:</p> <p>22 Q. Good morning, Dr. Marx.</p> <p>23 A. Good morning.</p> <p>24 Q. Could you reintroduce yourself to the</p> <p>25 Panel?</p>	<p style="text-align: right;">5480</p> <p>1 A. Yes, it is.</p> <p>2 MR. ASSMUS: Your Honor, we'd move for</p> <p>3 the admission into evidence of Trial Exhibit 1069,</p> <p>4 her written rebuttal testimony.</p> <p>5 JUDGE BARNETT: 1069 is admitted.</p> <p>6 (Pandora Exhibit Number 1069 was marked</p> <p>7 and received into evidence.)</p> <p>8 BY MR. ASSMUS:</p> <p>9 Q. Dr. Marx, could you briefly describe your</p> <p>10 role in the rebuttal phase of this proceeding?</p> <p>11 A. I was asked to respond to the Copyright</p> <p>12 Owners' experts' written direct testimony, and I</p> <p>13 focused on the testimony of the economists, as</p> <p>14 Drs. Gans, Eisenach, and Rysman.</p> <p>15 Q. And you've watched some of the testimony</p> <p>16 in this proceeding as well?</p> <p>17 A. Yes, sir.</p> <p>18 Q. Have you seen any evidence during the</p> <p>19 course of this proceeding, including the testimony</p> <p>20 of the Copyright Owners' economic experts, that</p> <p>21 causes you to change any of the conclusions you</p> <p>22 reached in either your written direct or your</p> <p>23 written rebuttal testimony?</p> <p>24 A. No, I have not.</p> <p>25 Q. Now, did you use some Spotify data in</p>

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<p>5481</p> <p>1 connection with your rebuttal testimony?</p> <p>2 A. I did. I was able to update some of the</p> <p>3 calculations to go from -- instead of just 2015,</p> <p>4 from the last -- the full year from the last half of</p> <p>5 2015 to the first half of 2016.</p> <p>6 Q. And are the sources of Spotify data that</p> <p>7 you relied upon cited in your report?</p> <p>8 A. Yes, they are.</p> <p>9 Q. And have you prepared some slides in</p> <p>10 connection with your testimony today?</p> <p>11 A. Yes, I have.</p> <p>12 Q. And if you could turn to Demonstrative 2,</p> <p>13 before we get into the details of your work and your</p> <p>14 findings, I'm hoping you could provide the Panel</p> <p>15 with an overview of your rebuttal conclusions.</p> <p>16 A. Yes. The Copyright Owners' proposal</p> <p>17 changes the structure and rates -- the structure of</p> <p>18 rates and substantially increases their level. The</p> <p>19 flat per-stream per-user structure particularly</p> <p>20 penalizes services targeting low-willingness-to-pay</p> <p>21 consumers, and mechanical royalties more than double</p> <p>22 for other services as well. And despite these</p> <p>23 changes, the Copyright Owners' experts opine that</p> <p>24 the Copyright Owners' proposal is reasonable and</p> <p>25 meets the 801(b) factors.</p>	<p>5483</p> <p>1 are falling through to the publishers now in the</p> <p>2 form of increased publisher royalties.</p> <p>3 Q. And I'd ask you to briefly describe your</p> <p>4 understanding of the Copyright Owners' proposal.</p> <p>5 A. Yes. I prepared a slide on this. The</p> <p>6 Copyright Owners' proposal has all Services paying</p> <p>7 the same amount for every stream, regardless of</p> <p>8 length, and every user, regardless of the service</p> <p>9 characteristics. And the proposal is that the</p> <p>10 mechanical royalty would be the greater of .0015</p> <p>11 dollars per play and \$1.06 per end user.</p> <p>12 And just to provide a little bit more</p> <p>13 texture, I have in the green boxes the definitions</p> <p>14 of play and end user from the Copyright Owners'</p> <p>15 proposal.</p> <p>16 A play is defined as the digital</p> <p>17 transmission of any portion of a sound recording of</p> <p>18 a musical work in the form of an interactive stream</p> <p>19 or limited download. And an end user is each unique</p> <p>20 individual or entity that has access to the offering</p> <p>21 whether by virtue of the purchase of a subscription</p> <p>22 to access the offering or otherwise.</p> <p>23 Q. Now, you understand Spotify offers an</p> <p>24 ad-supported service?</p> <p>25 A. Yes.</p>
<p>5482</p> <p>1 And as I explain in my written rebuttal</p> <p>2 testimony, the Copyright Owners' economists ignore</p> <p>3 or misinterpret the 801(b) factors. The Copyright</p> <p>4 Owners' economists provide misleading analyses.</p> <p>5 They haven't shown any ill effects of the current</p> <p>6 system. Publisher royalties are increasing with the</p> <p>7 rise of interactive streaming. A wide variety of</p> <p>8 interactive streaming services compete today, with</p> <p>9 associated customer benefits, and there's no</p> <p>10 evidence of depressed musical works production.</p> <p>11 Q. On that last point, no evidence of</p> <p>12 depressed musical works production, if there were</p> <p>13 such a depression, what would you expect to see in</p> <p>14 the market?</p> <p>15 A. I would expect to see a reduction in the</p> <p>16 number of songwriters and songs being produced, for</p> <p>17 example.</p> <p>18 Q. And you haven't seen evidence of that?</p> <p>19 A. I have not seen evidence of that.</p> <p>20 Q. You also mentioned that publisher</p> <p>21 royalties are increasing with the rise of</p> <p>22 interactive streaming. How is that important to</p> <p>23 your economic analysis?</p> <p>24 A. That tells me that the benefits of the</p> <p>25 increased move towards interactive streaming are --</p>	<p>5484</p> <p>1 Q. When you interpret the definition of "end</p> <p>2 user," how do you apply that to Spotify's</p> <p>3 ad-supported service?</p> <p>4 A. With Spotify's ad-supported service, any</p> <p>5 registered user would have access to the offering.</p> <p>6 Q. Even though they weren't paying a</p> <p>7 subscription price?</p> <p>8 A. Even though they're not paying a</p> <p>9 subscription price and even if they don't access the</p> <p>10 service in a particular month, they would be a user</p> <p>11 that has access to it.</p> <p>12 Q. Now, did you analyze the Copyright</p> <p>13 Owners' proposal using that definition of an end</p> <p>14 user?</p> <p>15 A. I did it a couple ways. I analyzed the</p> <p>16 Copyright Owners' proposal using this definition,</p> <p>17 and also using a more restrictive definition,</p> <p>18 assuming that it applies only to a measure of active</p> <p>19 users.</p> <p>20 Q. And what definition of active users did</p> <p>21 you use for that alternative analysis?</p> <p>22 A. I used monthly active users, which would</p> <p>23 be any -- would count any user that accessed any</p> <p>24 portion of a stream at some point during a month.</p> <p>25 MR. ASSMUS: Your Honor, I need to move</p>

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<p>5485</p> <p>1 into some restricted testimony.  2 JUDGE BARNETT: Good morning. We will  3 have to briefly close the hearing room to anyone who  4 is not privy to restricted or confidential  5 information in this proceeding.  6 (Whereupon, the trial proceeded in  7 confidential session.)  8  9  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	<p>5559</p> <p>1 subscription services mixed use, just the S3  2 services.  3 JUDGE FEDER: And bundled?  4 THE WITNESS: And that's bundled. But  5 this is based on Figure 5 on page 10 of my written  6 rebuttal testimony. And in that figure in the  7 written testimony, it has Amazon and it has  8 Spotify's ad-supported service. So that -- that's  9 there. It's a 200 plus percent increase for Amazon  10 Prime Music.  11 BY MR. ASSMUS:  12 Q. And I'd also like to direct your  13 attention, without displaying it back, to  14 Demonstrative 18, the slide of the effective  15 per-play rates.  16 A. Yes.  17 Q. And if -- if it was shown that  18 Dr. Rysman's calculations of the effective per-play  19 rates with respect to, for example, Google and Apple  20 were inaccurate and overstated, how would that  21 affect the positioning of those data points on  22 Dr. Rysman's graph?  23 A. If they were overstated, then the lines  24 should come down closer to -- they should come down.  25 Q. And would that also affect your -- your</p>
<p>5558</p> <p>1 O P E N S E S S I O N  2 MR. ASSMUS: Just some cleanup on the  3 prior slides, I'm going to ask them not to put up so  4 we can stay in open session for a period, and then  5 I'll go back to restricted section -- session  6 towards the end.  7 JUDGE BARNETT: Okay, thank you.  8 BY MR. ASSMUS:  9 Q. Okay. First, Dr. Marx, Judge Feder asked  10 you a question about Demonstrative 10. And I think  11 he asked you in particular whether Amazon, I think  12 Amazon Prime Music, was included in the "other"  13 category in Demonstrative 10.  14 And he asked you if you might take a look  15 at that. Have you had a chance to take a look at  16 that?  17 A. Yes, I did. Remember that was  18 Demonstrative 10. It says across the -- the top of  19 the -- the title on the top of the figure, estimated  20 impact of the Copyright Owners' proposal on paid  21 subscription streaming services and, in parentheses,  22 (S3).  23 JUDGE FEDER: Yes.  24 THE WITNESS: This graph is only showing  25 paid subscription services, portable -- portable</p>	<p>5560</p> <p>1 analysis of the effective per-play on a  2 revenue-weighted basis?  3 A. It would affect the averages. They would  4 come down as well.  5 Q. And, finally, in terms of cleanup, you  6 mentioned that your demonstrative slide, I believe  7 it was 19, was based on HFA data. And what --  8 A. The Services report streams to HFA. And  9 so this, this slide is based on Dr. Rysman's data,  10 which I understand to be the streams that were  11 reported to HFA.  12 Q. And what -- what type of streams are  13 reported to HFA?  14 A. Spotify reports 30-second and longer  15 streams to HFA.  16 Q. Okay. If we could have demonstrative  17 slide 21. You indicated that the Copyright Owners'  18 economic experts made some errors in analysis of the  19 greater-of proposal. And I believe you have an  20 example of that in mind.  21 A. It's not so much that they make errors in  22 the analysis of it; it's just that they ignore it.  23 So they look at the comparisons of -- that relate to  24 the per-stream prong and -- well, focusing on the  25 per-stream prong and then some mention of per-user</p>

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<p>5561</p> <p>1 prong, but the proposal involves this greater-of 2 structure. 3 And I just wanted to offer a simple 4 stylized example to point out that it makes a 5 difference. And so what this example has is a 6 low-use service, a hypothetical low-use service that 7 has 100 subscribers and each subscriber is going to 8 stream 200 streams per month. And that's a service 9 that's paying a royalty of 62 dollars per month. 10 Q. And what's the basis for that royalty? 11 A. I'm not assuming any underlying formula. 12 Just -- just assume, in this example, that's the 13 royalty they pay. 14 JUDGE BARNETT: What's the rate they're 15 paying on? 16 THE WITNESS: It doesn't matter. 17 JUDGE BARNETT: Oh, it doesn't matter, 18 okay. 19 THE WITNESS: Yeah. So whatever formula 20 was in place, they had to pay 62 dollars. 21 JUDGE BARNETT: Understood. 22 THE WITNESS: And there's a high-use 23 service with 100 subs, but their subscribers are 24 streaming 1,200 streams per month. And whatever the 25 formula is, they're paying 150 dollars per month.</p> <p>5562</p> <p>1 In that world, this industry is paying a 2 total royalty of 212 dollars per month, and if you 3 divide by the total streams, they're paying .0015 4 dollars per stream, and they're paying \$1.06 per 5 subscriber per user. 6 So this industry matches the -- 7 individually, the per-play stream for the Copyright 8 Owners' proposal and the per-user stream. So you 9 might think, looking at this, oh, if you impose -- 10 if you make this industry pay the Copyright Owners' 11 proposal, it shouldn't really have much of an 12 effect. 13 But that's not right because of the 14 greater-of aspect. And so if you look at the next 15 slide, if you apply the Copyright Owners' proposal 16 to my hypothetical industry, then the low-use 17 service ends up paying 106 dollars per month, 18 because they will pay on the per-subscriber prong, 19 and the high-use service will pay 180 dollars per 20 month, because they will pay on the per-stream 21 prong. 22 Combined, then, total royalties go up by 23 35 percent and the industry as a whole is now paying 24 .0020, 20 cents, per 100 instead of 15 cents per 100 25 streams, and paying \$1.43 per user.</p>	<p>5563</p> <p>1 So I just wanted to illustrate that it's 2 insufficient to look at the industry and say: Oh, 3 the Copyright Owners' proposal matches the 4 per-stream prong on average and matches the per-user 5 prong on average and so it's okay; it doesn't imply 6 much of a change to the industry. That's not right. 7 BY MR. ASSMUS: 8 Q. And if we could go next, if we could skip 9 to Demonstrative 24. We talked earlier about 10 Dr. Gans' Shapley-inspired benchmark. Can you 11 explain your criticisms of that Shapley-inspired 12 analysis? 13 A. Yes. So this is Dr. Gans written direct 14 testimony. What he does in that analysis is that he 15 assumes that the record labels' Shapley value, their 16 fair return, is equal to their current profits, 17 which, as I have noted, are inflated by market power 18 and other issues. 19 He doesn't model the copyright users at 20 all, and so he doesn't calculate a Shapley value for 21 interactive streaming and so doesn't have anything 22 to say based on this analysis about the appropriate 23 division of surplus between Copyright Owners and the 24 interactive streaming services. 25 Q. Okay. And I do need to go back to</p> <p>5564</p> <p>1 restricted session, unfortunately. 2 JUDGE BARNETT: We will be closing the 3 hearing room to those who are not privy to 4 restricted information. 5 (Whereupon, the trial proceeded in 6 confidential session.) 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
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<p>5568</p> <p>1           O P E N   S E S S I O N</p> <p>2 BY MR. ASSMUS:</p> <p>3       Q.   And if we could have slide 27. So,</p> <p>4 Dr. Marx, turning back to a more holistic view of</p> <p>5 this, could you describe for the Panel your view of</p> <p>6 the benefits of the current rate structure?</p> <p>7       A.   I discuss in my written rebuttal</p> <p>8 testimony a number of benefits of the current rate</p> <p>9 structure. One is its adaptability to different</p> <p>10 business models, and it allows for differentiated</p> <p>11 products serving different customer segments with a</p> <p>12 variety of preferences and a variety of willingness</p> <p>13 to pay for streaming services.</p> <p>14       It has efficiency benefits in that it</p> <p>15 promotes an all-you-can-eat model of interactive</p> <p>16 streaming, which would be efficient in a world with</p> <p>17 zero or close to zero cost for an incremental stream</p> <p>18 to a subscriber.</p> <p>19       And streaming has increased the variety</p> <p>20 of music listening and introduced a new way for</p> <p>21 artists to be discovered. And, finally, the</p> <p>22 publishers' and labels' royalty revenues have</p> <p>23 increased as interactive streaming has grown.</p> <p>24       Q.   With respect to publishers' revenue</p> <p>25 increases, do the higher revenues to publishers</p>	<p>5570</p> <p>1 per-stream prong that applies for subscription</p> <p>2 services. So I think it brings Spotify's royalties</p> <p>3 up to something like 90 percent of their revenue in</p> <p>4 that case.</p> <p>5       It discourages efficiencies in the sense</p> <p>6 that it disincentivizes the provision of services</p> <p>7 that are targeted to consumers with low willingness</p> <p>8 to pay. And it runs counter to an efficient</p> <p>9 all-you-can-eat streaming model. And it represents</p> <p>10 a substantial change from current practice with</p> <p>11 associated disruption to the industry.</p> <p>12       MR. ASSMUS: Thank you. I'll reserve any</p> <p>13 time for redirect.</p> <p>14       JUDGE BARNETT: Thank you. Mr. Semel?</p> <p>15       MR. SEMEL: Thank you.</p> <p>16       JUDGE BARNETT: Is anyone else hearing</p> <p>17 the beep or have I just lost my mind?</p> <p>18       (Discussion off the record.)</p> <p>19       CROSS-EXAMINATION</p> <p>20 BY MR. SEMEL:</p> <p>21       Q.   Good morning, Dr. Marx.</p> <p>22       A.   Good morning, Mr. Semel.</p> <p>23       Q.   Soon I'm going to apply for partial</p> <p>24 credit for one of your courses.</p> <p>25       A.   Excellent.</p>
<p>5569</p> <p>1 themselves have an effect on songwriters or does it</p> <p>2 depend on whether or not that revenue is passed</p> <p>3 through to songwriters themselves?</p> <p>4       A.   It would depend on whether it's passed</p> <p>5 through to the songwriters. And I didn't have a lot</p> <p>6 of visibility into the relationship between the</p> <p>7 publishers and their songwriters.</p> <p>8       Q.   And then, finally, what do you view as</p> <p>9 the problems with the Copyright Owners' proposal,</p> <p>10 sort of on a more global basis?</p> <p>11       A.   This is a summary slide. It's my last</p> <p>12 slide. And it just lays out the high level, some of</p> <p>13 the problems I see with the Copyright Owners' rate</p> <p>14 proposal. It represents a large rate increase that</p> <p>15 I view as unjustified. It's so high as to make</p> <p>16 ad-supported services difficult or impossible to</p> <p>17 sustain. And rates for paid subscription services</p> <p>18 would more than double.</p> <p>19       And, in particular, Judge Strickler, you</p> <p>20 asked a question about what if there were a</p> <p>21 different structure for ad-supported, maybe keeping</p> <p>22 percentage-of-revenue there, and the Copyright</p> <p>23 Owners' proposal just for subscription. In that</p> <p>24 case, the impact would be even larger than this</p> <p>25 because once you take out ad-supported, it's the</p>	<p>5571</p> <p>1       MR. LANE: Do you want a grade?</p> <p>2 BY MR. SEMEL:</p> <p>3       Q.   I'd like to start by turning to page 88</p> <p>4 of your written rebuttal testimony. It's footnote</p> <p>5 245. And you write here, "as I explained in my</p> <p>6 written direct testimony, my view is that this 50</p> <p>7 cent per-user fee should be removed, which would</p> <p>8 mean that standalone portable subscription services</p> <p>9 would pay an all-in royalty pool, based on 10 and a</p> <p>10 half percent of revenue, 21 percent of sound</p> <p>11 recording payments, or 80 cents per user. PRO</p> <p>12 payments are deducted from the all-in royalty pool</p> <p>13 to determine mechanical royalties."</p> <p>14       And is that the rate structure that you</p> <p>15 believe is the best rate structure available for</p> <p>16 this service?</p> <p>17       A.   It's a rate structure that I think would</p> <p>18 be consistent with my economic interpretation of the</p> <p>19 801(b) factors, which suggests rates that are</p> <p>20 somewhat lower than current levels, and if you look</p> <p>21 at Services, what they're paying today, Spotify is</p> <p>22 the bulk of the industry and currently paying on the</p> <p>23 50 cent per-user mechanical floor.</p> <p>24       So if you were to make an adjustment to</p> <p>25 the current structure in a direction of reducing</p>

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<p style="text-align: right;">5572</p> <p>1 royalties, an obvious choice would be to either 2 adjust or remove that 50 cent mechanical floor. 3 Q. Thank you. I guess my question was a 4 little simpler. Is this the best rate structure 5 that you came up with in analyzing the possible rate 6 structures in this proceeding? 7 A. I wasn't asked to come up with a rate 8 structure. I was asked to help the Board to 9 determine reasonable rates under the 801(b) factors. 10 And so I provided my economic interpretation of 11 those factors and the implications of those. 12 I didn't try to do a search for the very 13 best possible rate structure. 14 Q. So what -- so you don't know if there are 15 better royalty rate structures available for this 16 service? 17 A. I think this one would meet the 801(b) 18 factors. It stays close to current structures and 19 satisfies other economic interpretations of 801(b) 20 factors, but I don't know if this is the very best. 21 Q. I guess what I'm trying to get at is what 22 was the scope that you included? You seem to say -- 23 you say it should be removed, which means you're 24 comparing it with some other alternative. What was 25 the pool of alternatives that you looked at in</p>	<p style="text-align: right;">5574</p> <p>1 favorable for economic efficiency, and that suggests 2 that a percentage-of-revenue royalty structure would 3 be most favorable. That puts you in the position of 4 thinking about whether there are revenue 5 mis-measurement issues and perhaps the 6 appropriateness of back-stops. 7 In this, in the footnote that you're 8 pointing to, I am referring back to my written 9 direct testimony where I'm pointing out that one way 10 to both stay close to current structures, which is 11 something -- which was my view of the fourth 801(b) 12 factors, that you might want to try to stay close to 13 current benchmarks. One way to do that, while 14 achieving the direction of change that's pointed to 15 by the other 801(b) factors, is to adjust or 16 eliminate that 50 cent per-subscriber floor. 17 Q. So I guess, just trying to come back, is 18 this the best rate structure that you are aware of 19 for this service? 20 A. Taking into account my economic 21 interpretation of the 801(b) factors, this, I think, 22 would be reasonable, and I -- I don't have something 23 to offer you that I think would dominate it, would 24 also stay equally close to current structures and 25 still move in the direction of -- that's pointed to</p>
<p style="text-align: right;">5573</p> <p>1 coming up with your opinion that this is what should 2 happen? 3 A. I was offering the observation that one 4 adjustment you could make to the current structure 5 that would stay close to the current structure but 6 yet move in the direction that is indicated by my 7 analysis, my economic analysis of the 801(b) 8 factors, would be to adjust or eliminate that 50 9 cent per-subscriber floor. 10 Q. And did you consider any other 11 alternative rate structures besides the current 12 structure or a structure in which you removed the 50 13 cent floor? 14 A. I considered the Copyright Owners' 15 proposal in my written rebuttal testimony. 16 Q. Okay. So we've got those three. So the 17 current rate structure, removing the 50 cent floor, 18 and the Copyright Owners' rate proposal. Did you 19 consider any other potential rate structures in 20 offering the opinion that what should happen is that 21 the mechanical floor should be removed? 22 A. In my written direct testimony, I 23 considered a much broader set of possibilities. For 24 example, in looking at the first 801(b) factor, I 25 looked at which rate structures would be most</p>	<p style="text-align: right;">5575</p> <p>1 by my analysis of the first, second, and third 2 801(b) factors. 3 Q. So I just want to be clear. This is the 4 best rate structure that you are aware of for this 5 service? 6 MR. ASSMUS: Objection, Your Honor, that 7 is asked and answered. 8 JUDGE BARNETT: Sustained. She already 9 said no. 10 MR. SEMEL: She already said no? 11 JUDGE BARNETT: Well, she said she didn't 12 analyze or try to create another structure. 13 MR. SEMEL: Understood. 14 BY MR. SEMEL: 15 Q. I guess I was trying to get at "aware 16 of." So I just meant, within the pool that she has 17 analyzed, this is the best rate structure that you 18 are aware of? You may not -- there may be another 19 one you're not aware of, but this is the best rate 20 structure that you are aware of in your opinion? 21 MR. ASSMUS: I have the same objection, 22 Your Honor. 23 JUDGE BARNETT: No, that's a refinement. 24 She can answer that. 25 THE WITNESS: I don't have anything</p>

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<p>5576</p> <p>1 better to offer you right now that would stay 2 equally close to current structures, yet still be 3 moving in the direction that's pointed to by my 4 economic analysis of the first, second, and third 5 801(b) factors. 6 BY MR. SEMEL: 7 Q. And within these structures, the rates 8 that you advocated for here, these are the best 9 rates that you're aware of for this service? 10 A. Again, I'm not sure what you mean by 11 "best rates." What I mean are rates that are 12 consistent with the 801(b) factors. The fourth 13 801(b) factor, I'm interpreting as pushing you to 14 stay close to relevant benchmarks. And -- and so if 15 you want to try to stay close to the current 16 structure, but move it in the direction indicated by 17 my economic -- economic analysis of the first three 18 801(b) factors, this is in my view a good choice. 19 Q. Did you analyze whether any improvements 20 could be made to this rate structure or rate? 21 A. Again, I wasn't tasked with finding the 22 very best rate structure. I was just trying to be 23 helpful in providing an economic interpretation of 24 the 801(b) factors. 25 Q. I'm sorry if I meant to cast aspersions.</p>	<p>5578</p> <p>1 question, which is what led me to my question, was 2 did you look at the rates themselves within the 3 structure and make a determination as to whether 4 they could be improved. And I think the answer is 5 with regard to the -- the floor, mechanical-only 6 floor, the answer is yes, you did. 7 THE WITNESS: Yes. 8 JUDGE STRICKLER: But did you go through 9 the same process for each element of the -- of the 10 existing rates or Spotify's proposal and say, yes, 11 this rate makes sense or, no, this rate does not 12 make sense? Did you do the same type of -- same 13 degree of analysis on each element of the structure? 14 THE WITNESS: I did look at the 80 cent 15 per-subscriber minimum that's in the formula for 16 portable standalone subscription services, and note 17 that if you view that as a benchmark -- sorry, as a 18 back-stop for 10 and a half percent of revenue, then 19 it is at approximately the correct level. 20 If you view 10 and a half percent of 21 revenue for a pure-play service like Spotify as 22 being your target, then 80 cents per subscriber is 23 about right as a back-stop there. So I -- I noted 24 that. So the structure, then, that you're left 25 with, keeping the current -- current structure but</p>
<p>5577</p> <p>1 I just was asking. 2 JUDGE STRICKLER: Well, if I may, you did 3 actually make one analytical adjustment, right? You 4 recommend removing the -- the mechanical-only floor, 5 correct? 6 THE WITNESS: That's right. 7 JUDGE STRICKLER: You did pick that one 8 as -- as -- in looking -- in looking at the existing 9 structure and say the existing structure that you 10 find best among the ones you've seen provided you 11 make this one change? 12 THE WITNESS: That's right. 13 JUDGE STRICKLER: So you did look at the 14 rates and decide to make a change? 15 THE WITNESS: Yes. The -- my analysis of 16 the first -- of all of the 801(b) factors, the 17 benchmarks, the Shapley value analysis, point in the 18 direction of moving slightly lower relative to 19 current rates. If you want to move slightly lower 20 relative to current rates, the only way to change -- 21 the only way to stay close to current structure and 22 change the rate that Spotify is -- is paying is to 23 adjust or remove that 50 cent per-subscriber floor 24 because that's what they're paying on. 25 JUDGE STRICKLER: Right. So counsel's</p>	<p>5579</p> <p>1 making that adjustment to the portable standalone 2 services mixed-use formula, that stays close to 3 current structures and moves in the direction 4 indicated by my economic analysis of the 801(b) 5 factors. And so I -- I offer that as a possibility 6 that I think is reasonable and meets the 801(b) 7 factors. 8 JUDGE FEDER: Sorry, are you finished? 9 JUDGE STRICKLER: Yes. 10 JUDGE FEDER: At a 10 dollar per month 11 prescription rate, 10 and a half is about a buck 5, 12 correct? 13 THE WITNESS: There -- the average 14 per-user revenue for a service like Spotify is \$7.50 15 a month. Even though that -- 16 JUDGE FEDER: Taking into account 17 discounts and such? 18 THE WITNESS: Yes. So that's -- that's 19 what's the gap is there. And 80 cents is 10 and a 20 half percent of \$7.50. So that's why that number 21 comes out about the same. 22 JUDGE BARNETT: Dr. Marx, did I hear you 23 say that you were looking at the current structure 24 and determining if there was some way you could 25 modify the current rates to make them better, i.e.,</p>

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<p style="text-align: right;">5580</p> <p>1 to lower the rates?</p> <p>2 THE WITNESS: My economic analysis of the</p> <p>3 801(b) factors, the second, third, and fourth 801(b)</p> <p>4 factors led me to look at a Shapley value approach,</p> <p>5 which suggests that current royalties are high</p> <p>6 relative to a fair division and that, in particular,</p> <p>7 musical works royalties are high relative to a fair</p> <p>8 division.</p> <p>9 And when I looked at the benchmarks,</p> <p>10 looked at personal digital downloads and CDs, and</p> <p>11 looked at the percentage-of-revenue that's being</p> <p>12 paid there, streaming royalties are high relative to</p> <p>13 those benchmarks.</p> <p>14 So if you thought that pushes you in the</p> <p>15 direction that you might want to lower royalties</p> <p>16 somewhat, currently Spotify is paying over</p> <p>17 12 percent in musical works royalties. So they're</p> <p>18 not paying the 10 and a half percent; they're paying</p> <p>19 over 12 percent, because they're paying on that 50</p> <p>20 cent mechanical floor.</p> <p>21 If you remove the 50 cent mechanical</p> <p>22 floor, they're still paying something like</p> <p>23 11 percent of revenue, but it brings it down closer</p> <p>24 to those other benchmarks. They would still pay on</p> <p>25 the 80 cent, in 2015, pay on the 80 cent</p>	<p style="text-align: right;">5582</p> <p>1 position where the publishers and the sound</p> <p>2 recording and the -- and the record labels are the</p> <p>3 same firms and they could, by increasing sound</p> <p>4 recording royalties, mechanically also increase</p> <p>5 their musical works royalties.</p> <p>6 So it provides protection to the Services</p> <p>7 in that sense, that they are less vulnerable to a</p> <p>8 manipulation of the sound recording royalties. But</p> <p>9 it also provides protection against revenue</p> <p>10 mis-measurement for the Copyright Owners.</p> <p>11 Q. Well, it is in a lesser-than prong,</p> <p>12 correct?</p> <p>13 A. It is. It's in a lessen-than prong</p> <p>14 embedded in a greater-than prong, yes.</p> <p>15 Q. Right. But after -- for someone who</p> <p>16 benefits -- for someone who is a copyright owner and</p> <p>17 you have a lesser-than prong, right, they'd be happy</p> <p>18 to get rid of as many of the parts of the</p> <p>19 lesser-than prong as they can, correct? No one</p> <p>20 benefits from having an additional prong in the</p> <p>21 lesser-than prong, correct?</p> <p>22 A. The Services would benefit.</p> <p>23 Q. Correct. The Services would benefit. So</p> <p>24 this is not a back-stop for the Copyright Owners';</p> <p>25 it's for the Services, correct?</p>
<p style="text-align: right;">5581</p> <p>1 per-subscriber minima.</p> <p>2 MR. MANCINI: Your Honors, if I may, I</p> <p>3 did not want to interrupt the colloquy, but some of</p> <p>4 the information is subject to Spotify restricted</p> <p>5 information. I don't think we need to close the</p> <p>6 courtroom. Perhaps we'll send a letter to correct</p> <p>7 the transcript after the fact.</p> <p>8 JUDGE BARNETT: Okay, thank you. I'm</p> <p>9 done with my question. I'm not -- I have nothing</p> <p>10 more on that topic. Mr. Semel?</p> <p>11 MR. SEMEL: Thank you.</p> <p>12 BY MR. SEMEL:</p> <p>13 Q. You mentioned just now an 80 cent</p> <p>14 per-user rate. And that's -- you're talking about</p> <p>15 the one in the portable mixed-use category?</p> <p>16 A. That's right.</p> <p>17 Q. And in your written direct testimony,</p> <p>18 correct, you describe that as something that</p> <p>19 provides protection to the Services, correct?</p> <p>20 A. There is a place where I talk about it</p> <p>21 providing protection to the Services relative to the</p> <p>22 percentage of sound recording royalties that it's</p> <p>23 paired with in the formula. So without that there,</p> <p>24 if you, for example, only had the percentage of</p> <p>25 sound recording royalties, then you'd be in a</p>	<p style="text-align: right;">5583</p> <p>1 A. No. It's a -- it's a back-stop relative</p> <p>2 to the 10 and a half percent of revenue. It's in</p> <p>3 the greater-than prong. So the -- with the 80 cent</p> <p>4 per revenue in there, the -- if 10 and a</p> <p>5 half percent of revenue were to go below 80 cent</p> <p>6 per-subscriber, then the 80 cent per-subscriber</p> <p>7 would kick in, and so --</p> <p>8 Q. Only if the -- sorry.</p> <p>9 A. -- it protects the Copyright Owners</p> <p>10 against the possibility of revenue mis-measurement.</p> <p>11 Q. Just from an economic perspective, do you</p> <p>12 agree that from the Copyright Owners' perspective,</p> <p>13 it's better off to not have the 80 cents in the</p> <p>14 lesser-than prong than to have the 80 cents in the</p> <p>15 lesser-than prong?</p> <p>16 A. The Copyright Owners would be much worse</p> <p>17 off without the 80 cent prong, if there were revenue</p> <p>18 mis-measurement because then they would get only 10</p> <p>19 and a half percent of mis-measured revenue. The 80</p> <p>20 cents is there to provide protection for the</p> <p>21 Services -- okay, let me not opine about why it's</p> <p>22 there.</p> <p>23 It plays the role that it provides</p> <p>24 protection for the Services in case there is revenue</p> <p>25 mis-measurement because it is the greater of 10 and</p>

<p>5584</p> <p>1 a half percent of revenue and another prong.  2 JUDGE STRICKLER: You mean it provides  3 protection for the Copyright Owners? You said for  4 the Services.  5 THE WITNESS: Did I say it wrong? I'm  6 sorry.  7 JUDGE STRICKLER: You said for the  8 Services.  9 THE WITNESS: Sorry. Thank you.  10 It -- it's playing two roles. It's  11 embedded in a greater-than structure where it  12 provides protection to the Copyright Owners against  13 revenue mis-measurement. It's embedded in a -- in a  14 lesser-than piece where it provides protection for  15 the Services against manipulation of the sound  16 recording royalties.  17 So to characterize it as only being there  18 for the protection of the Services, I think that's  19 wrong because it is there to provide a back-stop on  20 the 10 and a half percent of revenue.  21 BY MR. SEMEL:  22 Q. Well, let me put it another way. If you  23 removed the 80 cent prong from the lesser-than  24 formula and left the TCC prong, there is no scenario  25 in which rates go down as a result of that?</p>	<p>5586</p> <p>1 recording royalties?  2 Q. Right. The 80 cents operates as a cap  3 because it is in a lesser-than prong?  4 A. If I'm understanding you correctly, yes.  5 Q. Just going back to the rate structure  6 that we were talking about that you wrote about in  7 footnote 245, does your opinion advocate for the  8 status quo or for a change in the status quo?  9 A. I don't think of myself as advocating one  10 way or another, but I provide an economic  11 interpretation of the 801(b) factors. That  12 interpretation suggests that reasonable royalties  13 under the 801(b) factors would be somewhat lower  14 than current levels. It points to the -- that it's  15 favorable for economic efficiency to use a  16 percentage-of-revenue structure, and I'm noting that  17 one way to stay close to current structures but move  18 in the direction of somewhat lower mechanical  19 royalties would be to adjust or eliminate the 50  20 cent mechanical floor.  21 Q. But you know you reference the term  22 "status quo" over a dozen times in your rebuttal  23 report; do you know that?  24 A. I didn't count.  25 Q. Does it surprise you?</p>
<p>5585</p> <p>1 A. I think that's right. Let me just think  2 through. Now, are you leaving the mechanical floor  3 in there?  4 Q. All I'm doing is removing -- it's a  5 lesser-than prong. So if you remove something from  6 it, it just means there's one thing that can't drag  7 down the prong. So I'm just saying if you remove  8 the 80 cent prong, there's no way you wind up with  9 lower rates.  10 A. You get a larger all-in royalty pool, and  11 now when you subtract the PRO payments, the 50 cent  12 mechanical floor might no longer bind. And so I  13 guess mechanical royalties could go down. But I  14 think we need to be a little bit careful.  15 Q. But you don't disagree that, in your  16 written direct testimony, you describe the 80 cent  17 per-subscriber minimum as something that provides  18 protection to the Services, correct?  19 A. I mention that, I recall, but it also  20 provides protection against revenue mis-measurement,  21 and I definitely say that in my written direct  22 testimony as well.  23 Q. And it operates as a cap on the amount of  24 -- a cap on the TCC prong, correct?  25 A. The TCC meaning the percentage of sound</p>	<p>5587</p> <p>1 A. Not particularly.  2 Q. But you don't know whether you were  3 advocating for the status quo or not?  4 A. I'm just offering to the Board the  5 statement that one way, in my opinion, to meet the  6 801(b) factors is to avoid disruption by staying  7 close to current levels and make an adjustment.  8 There is an adjustment that can be made, the removal  9 or adjustment of the 50 cent mechanical floor, that  10 doesn't make much of a change to the current  11 structure, stays close to the current structures,  12 but moves you in the direction of somewhat lower  13 mechanical royalties.  14 In particular, for Spotify, it would move  15 them from paying over 12 percent of mechanical  16 royalties down to paying something like 11 percent.  17 JUDGE STRICKLER: But if we're concerned,  18 Dr. Marx, about not being disruptive and, say, we're  19 just looking at the -- at the fourth factor, 801(b)  20 factor, keeping the mechanical floor would be less  21 disruptive because Spotify pays on that at that  22 level pursuant to that part of the structure, right?  23 THE WITNESS: Yeah, if you were focused  24 on not making -- if the -- if the best as far as no  25 disruption is not to make any change, then that's</p>

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<p>5588</p> <p>1 right. I was trying to stay close to current 2 relevant benchmarks, while still trying to address 3 what the other 801(b) factors are pointing towards. 4 JUDGE STRICKLER: How do the other 801(b) 5 factors apply specifically to support an elimination 6 of the mechanical-only floor? 7 THE WITNESS: They don't point to, oh, it 8 is a mechanical-only floor that needs to be removed. 9 My benchmark analysis and the Shapley value analysis 10 points to fair and benchmark rates being somewhat 11 lower than current levels. 12 If you want to make an adjustment that's 13 going to produce somewhat lower royalties, in an 14 industry where Spotify is the dominant player and 15 their subscription streaming service is the dominant 16 source of revenue, the adjustment that you're going 17 to have to make is going to have to be one that 18 affects what Spotify is paying and they pay on that 19 50 cent per-user prong. 20 So other adjustments that you could make 21 to different parts of that formula are not going to 22 change what Spotify is paying. So if you want to 23 stay close and yet make a difference in what Spotify 24 is paying for its subscription streaming service, 25 your only choice is to make an adjustment to that 50</p>	<p>5590</p> <p>1 11 percent. But that's -- that's the lever, if you 2 want to stay close to current structures and still 3 reduce somewhat the amounts that they're paying. 4 JUDGE STRICKLER: And you would reduce 5 it, again, not because reducing in its own right is 6 appropriate but because the Shapley analysis 7 suggests to you that -- that it should be reduced to 8 that level? 9 THE WITNESS: That's right, the Shapley 10 and the benchmarks, the benchmarking against the 11 percentage-of-revenue and, but PDDs and CDs are 12 paying. 13 JUDGE STRICKLER: Subpart A analysis? 14 THE WITNESS: That's right. 15 JUDGE STRICKLER: Thank you. 16 JUDGE BARNETT: Dr. Marx, with regard to 17 disruption, the standard, I believe, is to minimize 18 the disruptive impact on the structure of the 19 industry. It's not just disruption to the current 20 formula. 21 THE WITNESS: I think it's current 22 industry and I think generally prevailing industry 23 practices was mentioned there. 24 JUDGE BARNETT: Yes, that's -- that's 25 right. So is it your opinion that the kinds of</p>
<p>5589</p> <p>1 cent mechanical floor. 2 JUDGE STRICKLER: So you're saying all of 3 the four factors taken together in 801(b), in your 4 opinion, require or justify a lower rate and the 5 only way you can accomplish that, given where 6 Spotify pays, which is on the mechanical-only floor, 7 requires that part of the -- of the structure to be 8 removed? 9 THE WITNESS: Or adjusted downward, 10 that's right. 11 JUDGE STRICKLER: Okay. Well, you didn't 12 propose adjusting downward? 13 THE WITNESS: I did. It's in my written 14 direct testimony. I agree Mr. Semel has a footnote 15 here where I say only eliminate, but in my written 16 direct testimony, I say it would point to it being 17 adjusted or removed. 18 JUDGE STRICKLER: I know this is your 19 rebuttal testimony, but do you recall what you said 20 on direct as to what -- what the mechanical-only 21 floor should be adjusted downward to? 22 THE WITNESS: I didn't give a number. I 23 said that if you wanted to push rates down, you need 24 to push that 50 cent down. And if you moved it all 25 the way, then you get Spotify down to something like</p>	<p>5591</p> <p>1 changes that are recommended by the Copyright 2 Owners, proposed by the Copyright Owners, would be 3 disruptive to the -- clearly, they're -- they're 4 different from generally prevailing industry 5 practices, at least in this license arena. 6 Did you look at whether those would be 7 disruptive to the entire industry? 8 THE WITNESS: Well, I thought about 9 whether it's disruptive to the structure of the 10 industry. And as an economist, I would think of 11 structure as including the cost structure and things 12 like barriers to entry. And so, clearly, it changes 13 the cost structure and greatly increases the cost to 14 these Services. 15 It also puts in place a barrier to entry 16 in the sense that if you are a new Service, you 17 might expect to have a period of time where you're 18 bringing in subscribers, you're starting to get them 19 to use your service but maybe don't have significant 20 revenues. You might have a bunch of people starting 21 with a free trial. In that kind of ramp-up period 22 under the Copyright Owners' proposal, you're going 23 to be paying for every stream, for every subscriber, 24 even through a period of time where you might not 25 have much or -- or any revenue.</p>

<p>5592</p> <p>1 So in that sense, it's -- I think it 2 increases the challenges for an entrant to come up 3 against that rate structure. 4 JUDGE BARNETT: If you open a restaurant 5 and start serving food, you have to buy the food 6 before you can serve the people, right? 7 THE WITNESS: I agree. 8 JUDGE BARNETT: Okay. 9 JUDGE STRICKLER: Building on Judge 10 Barnett's question -- she took you through the 11 statute and you added on some parts that were in the 12 statute as well. 13 But Dr. Eisenach, as you noted in 14 Demonstrative 14, cites to the -- the CRB's 2009 15 decision as to what constitutes disruption. And I'm 16 going to flip through and find his testimony, but he 17 does -- at least you put it in quotes, I think 18 you're accurate, he -- he points out that disruption 19 occurs if you have a substantial -- this is not in 20 quotation marks, but I think it's correct -- 21 substantial, immediate, and irreversible short-run 22 impact. 23 So I suppose maybe we can, for the 24 moment, take you through that because you're now 25 rebutting the Copyright Owners' proposal. Do you</p>	<p>5594</p> <p>1 over time, would you understand that to be less than 2 an immediate problem to the Services? 3 THE WITNESS: It would be immediately 4 whatever the first phase is, I guess, but it would 5 be -- I think the way you're posing it, it would be 6 immediately a less substantial impact and then 7 increasing over time. 8 JUDGE STRICKLER: Do you understand that 9 the Copyright Owners' proposal would be -- would 10 lead to an irreversible impact? 11 THE WITNESS: I'm not sure. So suppose 12 the Copyright Owners' proposal goes in place and 13 Spotify, for example, ends its ad-supported service. 14 Now suppose in five years, you return to current 15 structures. Could Spotify reintroduce an 16 ad-supported service? I suppose they would have 17 lost the years of investment in developing the -- 18 the stream of advertisers. I mean, it wouldn't be 19 trivial or costless to do, but I'm not sure I can 20 characterize it as being completely irreversible. 21 JUDGE STRICKLER: And the last factor is 22 short-run, but as I look at it, I take short-run to 23 be essentially synonymous for these purposes as 24 immediate. So I'm not going to take you through 25 that factor as well. Thank you.</p>
<p>5593</p> <p>1 believe the Copyright Owners' proposal would have a 2 substantial impact? 3 THE WITNESS: Absolutely. 4 JUDGE BARNETT: Why? 5 THE WITNESS: Because it increases 6 mechanical royalties by many multiples, pushes 7 existing services to the point where they would be 8 required to pay more than 100 percent of their 9 revenues in royalties and likely makes ad-supported 10 services, which are a substantial portion of the 11 interactive streaming market, difficult or 12 impossible to sustain. 13 JUDGE STRICKLER: And do you find that to 14 be -- to take the next factor that the 2009 decision 15 relates to -- an immediate impact? 16 THE WITNESS: Seems immediate to me. I 17 mean, my understanding is that at the moment this 18 proposal goes in place, we're in a world where the 19 Services have to figure out a way to come up with 20 the money to pay royalties greater than their 21 revenues. 22 JUDGE STRICKLER: We're going to be 23 setting rates over a five-year term. If that -- if 24 an increase in rates in the direction of what the 25 Copyright Owners is proposing would be phased in</p>	<p>5595</p> <p>1 BY MR. SEMEL: 2 Q. Do you believe that the current rate 3 structure violates the 801(b) factors? 4 A. No. 5 Q. So you believe -- 6 JUDGE STRICKLER: Excuse me. So even 7 having the mechanical-only floor is still consistent 8 with the 801(b) factors? 9 THE WITNESS: I view it as a benchmark 10 for 801(b) factors. The -- if I look at 801(b) 11 factors today, in my analysis, it suggests they 12 should be adjusted downward somewhat, but I view the 13 801(b) factors as a benchmark for -- sorry. 14 I view the current rates as a benchmark 15 for 801(b) factor rates. 16 JUDGE STRICKLER: Counsel's question was 17 do you think the current rate structure is 18 consistent with the 801(b) factors, and your answer 19 was yes. And the current rate structure has the 20 mechanical-only floor in it. That logically seems 21 to make it -- 22 THE WITNESS: Sorry. Yeah. 23 JUDGE STRICKLER: When you say you're 24 sorry, do you want to change your testimony or -- 25 THE WITNESS: Yes. Let me be more</p>

<p style="text-align: right;">5596</p> <p>1 careful. Consistent with the 801(b) factors, so I 2 think there's a -- it encompasses a range of things 3 that might be viewed as consistent with the 801(b) 4 factors. I think the current rates provide a 5 benchmark for what's consistent with the 801(b) 6 factors. 7       When I do my analysis, it suggests that 8 we can do better at meeting the 801(b) factors by 9 moving in the direction of pushing downward on that 10 current benchmark, reducing rates somewhat, but I -- 11 I don't view the current rate structure as being 12 something that has caused obvious disruption to the 13 industry or -- or being a problem. 14       JUDGE STRICKLER: So if I understand your 15 testimony correctly, you're saying that the current 16 rate structures satisfies the 801(b) factors but if 17 you remove the mechanical-only floor, it's a better 18 fit of the 801(b) factors; is that what you're 19 saying? 20       THE WITNESS: That's what I'm saying. 21       JUDGE STRICKLER: Thank you. 22 BY MR. SEMEL: 23       Q. So you believe that there is a range of 24 possible rates that satisfy the 801(b) factors, 25 correct?</p>	<p style="text-align: right;">5598</p> <p>1       Q. But your -- the rate structure that you 2 advocate for as the best fit, in fact, the sound 3 recording payments are the primary back-stop in that 4 rate structure, correct? 5       A. In the ad-supported service, it's true 6 that the sound recording royalties provide the 7 back-stop there. 8       Q. Right. So, in fact, your analysis does 9 rely on Spotify's sound recording payments in 10 determining what's appropriate? 11       A. In the analyses that I did related to the 12 801(b) factors, in those analyses, I'm not using 13 Spotify's sound recording payments, but you're right 14 that when I look at the current structure, Spotify's 15 sound recording payments are in there as a back-stop 16 for what they're paying for their ad-supported 17 service. 18       Q. And you felt that was appropriate? 19       A. I'm not sure what you're asking me. What 20 is appropriate? 21       Q. You felt that it satisfies the 801(b) 22 factors? 23       A. It's the current structure, yes. 24       Q. So did you do any analysis besides saying 25 because it's the current structure, it -- it</p>
<p style="text-align: right;">5597</p> <p>1       A. Rates and structures, yes. 2       Q. And have you analyzed how broad that 3 range is? 4       A. I used the interpretation of the fourth 5 801(b) factor as one would want to stay close to 6 relevant benchmarks, and I think you can stay close 7 to relevant benchmarks while simultaneously moving 8 in the direction that's suggested by my analyses of 9 the 801(b) factors as a whole. 10       Q. I guess my question was a little simpler. 11 Did you analyze how broad the range of rates are 12 that might satisfy the 801(b) factors? 13       A. I'm not sure I have a way to quantify 14 that for you. Certainly, rates that suggest that 15 Spotify should pay more than 100 percent of its 16 revenue in royalties would be outside of that range. 17       Q. But you haven't determined the parameters 18 of the range more precisely? 19       A. I don't have a precise quantification for 20 you of that. 21       Q. You mentioned in your direct testimony 22 that none of the analysis that you did relied on 23 Spotify's sound recording payments. Do you recall 24 that? 25       A. I recall.</p>	<p style="text-align: right;">5599</p> <p>1 satisfies the 801(b) factors or did you look at the 2 factors themselves and analyze whether they 3 satisfied the 801(b) factors? 4       A. I looked at the factors, and that -- and 5 did the analyses in my written direct testimony. 6 The ad-supported category, the formula there is 10 7 and a half percent of revenue. So it's a revenue -- 8 percent-of-revenue structure. 9       The back-stop there is based on the sound 10 recording royalty payments. And I view that as 11 reasonable because there are practical 12 considerations here. In particular, for an 13 ad-supported service, the definition of a user, 14 there are some challenges associated with that 15 because you can have, as we saw in the calculations 16 that I did, registered users; you might register and 17 then disappear from the service for a long period of 18 time. 19       With a subscription, a paying user, 20 they're there paying, you can count them each month. 21 And how to appropriately count users for an 22 ad-supported service is more challenging. And so 23 taking into account practical considerations, I 24 think it's reasonable the way that category is set 25 up with a back-stop based on a percentage of sound</p>

<p>5600</p> <p>1 recording royalties. 2 Q. All right. So you believe that sound 3 recording -- a percentage of sound recording 4 royalties is a fair way of calculating royalties 5 under the 801(b) factors, correct? 6 A. I think in the particular case of 7 ad-supported services, it offers a reasonable way to 8 derive a back-stop for the percentage-of-revenue 9 calculation, given the practical consideration that 10 it is challenging to count users for an ad-supported 11 service. 12 Q. Okay. Just to be clear, because I used 13 the word "fair" and you used the word "reasonable." 14 Is there a difference in your mind between fair and 15 reasonable? 16 A. I'm an economist. And so fair is a -- is 17 a tough one for me because it doesn't have a unique 18 definition in economics. So I was intentionally not 19 using your word "fair." 20 I -- I gave fair a particular economic 21 interpretation in my written direct testimony of the 22 Shapley value. So I was trying to be clear there 23 about how I was using the word. 24 Q. But under the 801(b) factors they also 25 use the word "fair," correct?</p>	<p>5602</p> <p>1 users more effectively, if TIDAL is willing to get 2 subscribers paying 20 dollars per month for a 3 high-fidelity service, that would be additional 4 revenue. Might not be any more users, might not be 5 any more streams, but it would be additional 6 revenue. 7 The fairness criteria as interpreted 8 through the Shapley value says they should pay more 9 royalties. They've got this additional revenue for 10 the use of music, and they should share some of that 11 upstream. That doesn't happen with a per-stream or 12 per-user structure like the Copyright Owners' 13 structure. 14 So with the Shapley value interpretation 15 of fairness, a percentage-of-royalty rate structure 16 is fair for that criteria, and the Copyright Owners' 17 proposal is not. 18 Q. Okay. I'll try and go about this a 19 different way. 20 Do you believe that Spotify's rate 21 proposal is fair under the 801(b) factors? 22 A. I didn't analyze Spotify's -- all the 23 details of Spotify's rate proposal. 24 Q. So you don't know whether Spotify's rate 25 proposal is fair under the 801(b) factors?</p>
<p>5601</p> <p>1 A. Oh, yes, they do. That's why I felt the 2 need to give the 801(b) factors a specific economic 3 interpretation before I had something to offer to 4 the Panel about how to interpret them. 5 Q. And -- and you determined that a 6 percentage of sound recording payments was fair 7 using whatever interpretation you used of the 801(b) 8 factors? 9 A. No. The -- the Shapley value approach 10 that I used as the interpretation for fair tells you 11 something about the level of payments. It's not 12 specific about a rate structure. It just tells you 13 about how the revenues should be divided up among 14 the various parties. 15 Now, it's true that in -- in the Shapley 16 value setting, if revenues increased, it would 17 require that royalties also -- royalty payments, the 18 dollar amounts paid upstream, would also increase. 19 And so a percentage-of-revenue rate structure is 20 consistent with the Shapley value view of fairness. 21 And a per-subscriber or per-play payment is not 22 consistent with the fairness requirements of a 23 Shapley value. 24 For example, if Services were able to 25 price-discriminate among high-willingness-to-pay</p>	<p>5603</p> <p>1 A. Spotify's rate proposal is consistent 2 with the 801(b) factors in the sense that it 3 proposes to eliminate the 50 cent per-subscriber 4 mechanical floor, but Spotify's rate proposal also 5 involves some adjustments to the definition of 6 revenue and to the definition of subscribers that I 7 didn't analyze. 8 I wasn't asked to analyze Spotify's 9 proposal as a whole, and that's not what I did. 10 Q. Right. So just to be clear, your 11 opinions do not include the opinion that Spotify's 12 rates and terms are fair? 13 A. My opinion is that the adjustment that 14 Spotify has in its proposal, that is, to remove the 15 50 cent mechanical floor, that fits with my view of 16 the 801(b) factors and so fair within my 17 interpretation of fairness, within the 801(b) 18 factors. 19 There are other things in Spotify's 20 proposal that I didn't explore. 21 Q. So just to try to make my question a 22 little clearer, your opinions do not include the 23 opinion that, as a whole, Spotify's proposed rates 24 and terms are fair? 25 MR. ASSMUS: Objection, that's asked and</p>

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<p style="text-align: right;">5604</p> <p>1 answered.</p> <p>2 JUDGE BARNETT: Overruled.</p> <p>3 THE WITNESS: I'm not sure I can answer</p> <p>4 that. I haven't delved into some aspects of</p> <p>5 Spotify's proposal. I have looked at the aspect of</p> <p>6 it that is to remove the 50 cent mechanical floor.</p> <p>7 And that is consistent with my view of the 801(b)</p> <p>8 factors.</p> <p>9 But I haven't -- I wasn't asked to look</p> <p>10 at their proposal, and I didn't look at certain</p> <p>11 aspects of it. So I'm not in a good position to</p> <p>12 have an opinion about that.</p> <p>13 BY MR. SEMEL:</p> <p>14 Q. I actually wasn't asking you to make up</p> <p>15 an opinion on the spot. I was just trying to</p> <p>16 clarify that your opinions that you've offered in</p> <p>17 this case do not include the opinion that, as a</p> <p>18 whole, Spotify's proposed rates and terms are fair?</p> <p>19 And I believe you -- your answer seems to be yes,</p> <p>20 but I'm just trying to clarify that.</p> <p>21 A. When you say "as a whole," you mean</p> <p>22 considering all aspects of their proposal?</p> <p>23 Q. Yes, the proposal as a whole, like is</p> <p>24 this proposal as a whole fair?</p> <p>25 A. There are parts of it that I didn't</p>	<p style="text-align: right;">5606</p> <p>1 AFTERNOON SESSION</p> <p>2 (1:14 p.m.)</p> <p>3 JUDGE BARNETT: Please be seated.</p> <p>4 Mr. Semel, did you want to start with</p> <p>5 restricted information?</p> <p>6 MR. SEMEL: I think that's right.</p> <p>7 JUDGE BARNETT: Those of you in the</p> <p>8 courtroom who are not permitted to hear confidential</p> <p>9 business information in this proceeding, please wait</p> <p>10 outside.</p> <p>11 (Whereupon, the trial proceeded in</p> <p>12 confidential session.)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">5605</p> <p>1 analyze, so I did not reach an opinion about that.</p> <p>2 Q. Okay, thank you.</p> <p>3 MR. SEMEL: I'm probably going to do a</p> <p>4 restricted session now, so I don't know if you want</p> <p>5 to break.</p> <p>6 JUDGE BARNETT: Yes. Let's be at recess</p> <p>7 until 1:00 o'clock or five after.</p> <p>8 (Whereupon, at 12:06 p.m., a lunch recess</p> <p>9 was taken.)</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">5653</p> <p>1 O P E N S E S S I O N</p> <p>2 JUDGE BARNETT: What were you saying?</p> <p>3 MR. ASSMUS: Very brief redirect, Your</p> <p>4 Honor, and then I would like to address some</p> <p>5 exhibits I neglected to address during my direct on</p> <p>6 her rebuttal. We need to come up for a new word for</p> <p>7 direct on rebuttal.</p> <p>8 REDIRECT EXAMINATION</p> <p>9 BY MR. ASSMUS:</p> <p>10 Q. Dr. Marx, you recall just now you and Mr.</p> <p>11 Semel discussed this concept of rates for long play</p> <p>12 songs?</p> <p>13 A. Yes.</p> <p>14 Q. Did you in connection with your analysis</p> <p>15 of the PDD benchmark do an adjustment for long</p> <p>16 plays?</p> <p>17 A. Yes, I did.</p> <p>18 Q. And do you recall the level of that</p> <p>19 adjustment in terms of a percentage?</p> <p>20 A. I had an estimate of the percentage of</p> <p>21 songs that were above five minutes and used an</p> <p>22 estimate of how much above five minutes those songs</p> <p>23 were on average and applied the incremental payment</p> <p>24 per minute for songs above five minutes.</p> <p>25 Q. And did that end up being a very big</p>

<p>5654</p> <p>1 adjustment?</p> <p>2 A. It wasn't a big adjustment. It was -- it</p> <p>3 went from 9.1 cents per stream to, I think, 9.6</p> <p>4 cents.</p> <p>5 Q. And based on that could an adjustment for</p> <p>6 long plays in the HFA data have anywhere near the</p> <p>7 effect of the difference you saw between 30 second</p> <p>8 streams and all streams?</p> <p>9 A. No.</p> <p>10 Q. One final question. We have talked a lot</p> <p>11 about Spotify's ad-supported service and its impact</p> <p>12 on Spotify were it to close.</p> <p>13 Would it be good for consumers if Spotify</p> <p>14 was to shut down its ad-supported service?</p> <p>15 A. It would be bad for the roughly half of</p> <p>16 the consumers that are streaming consumers who are</p> <p>17 using the ad-supported service. If that's their</p> <p>18 choice, it wouldn't be there any more.</p> <p>19 MR. ASSMUS: Nothing further on redirect,</p> <p>20 Your Honor.</p> <p>21 And I just wanted to address some of the</p> <p>22 exhibits.</p> <p>23 JUDGE BARNETT: Okay.</p> <p>24 MR. ASSMUS: There are just a handful of</p> <p>25 exhibits that we are admitting for the truth of the</p>	<p>5656</p> <p>1 THE CLERK: I have a preference if you</p> <p>2 could read them.</p> <p>3 MR. ASSMUS: Absolutely. It helps us</p> <p>4 later in the record when we want to do a search, so</p> <p>5 I will read them as quickly as I can without too</p> <p>6 quickly. They are Exhibits 55, 62, 246, 846, 867,</p> <p>7 887, 973, 1000, 1001, 1003, 1005, 1007, 1009, 1010,</p> <p>8 1012, 1015, 1017, 1018, 1019, 1028, 1029, 1030, and</p> <p>9 then 1034 through 1038 inclusive, and 1041, 1042,</p> <p>10 1043, 1598, and I think I am at a big range here,</p> <p>11 1741 through 1752 inclusive, 2805, 2817, 2896, 3118,</p> <p>12 3121 and 3359.</p> <p>13 JUDGE FEDER: Mr. Assmus, could you check</p> <p>14 your list? Did you mean to say 1005 to 1007 or 1005</p> <p>15 and 1007?</p> <p>16 MR. ASSMUS: I meant to and hope I did</p> <p>17 say 1005 and 1007.</p> <p>18 JUDGE FEDER: Okay. Thanks. Thank you.</p> <p>19 JUDGE BARNETT: Thank you. Anything</p> <p>20 further then? Those are received.</p> <p>21 (Amazon Exhibit Numbers 55, 62, 246 were</p> <p>22 marked and received into evidence.)</p> <p>23 (Google Exhibit Number 846 and 867 were</p> <p>24 marked and received into evidence.)</p> <p>25 (Pandora Exhibit Numbers 887, 973, 1000,</p>
<p>5655</p> <p>1 matter asserted. I have given that list to Mr.</p> <p>2 Semel. The ones that are not yet admitted that were</p> <p>3 in our binders are Trial Exhibits 731, 1013, 2597</p> <p>4 and 2598. Those are all in agreement.</p> <p>5 MR. SEMEL: We have objection.</p> <p>6 JUDGE BARNETT: Those are admitted.</p> <p>7 (Google Exhibit Number 731 was marked and</p> <p>8 received into evidence.)</p> <p>9 (Pandora Exhibit Number 1013 was marked</p> <p>10 and received into evidence.)</p> <p>11 (Copyright Owners Exhibit Numbers 2597</p> <p>12 and 2598 were marked and received into evidence.)</p> <p>13 MR. ASSMUS: And then we took a page out</p> <p>14 of the Copyright Owners' playbook, which I think</p> <p>15 took a page out of ours in terms of an index, but we</p> <p>16 have in the binder a list of the reliance exhibits</p> <p>17 starting on the second page of the binder.</p> <p>18 I am happy to read those into the record</p> <p>19 or hand them to the clerk afterwards for recording</p> <p>20 them as admitted. I don't know if Mr. Semel has any</p> <p>21 objection to entry of any of those on a reliance</p> <p>22 basis only.</p> <p>23 MR. SEMEL: No, in this category we have</p> <p>24 of not for the truth, no.</p> <p>25 JUDGE BARNETT: Okay.</p>	<p>5657</p> <p>1 1001, 1003, 1005, 1007, 1009, 1010, 1012, 1015,</p> <p>2 1017, 1018, 1019, 1028, 1029, 1030, 1034 through</p> <p>3 1038, 1041, 1042, 1043 were marked and received into</p> <p>4 evidence.)</p> <p>5 (Apple Exhibit Number 1598 was marked and</p> <p>6 received into evidence.)</p> <p>7 (Copyright Owners Exhibit Numbers 1741</p> <p>8 through 1752, 2805, 2817, 2896, 3118, 3121, 3359</p> <p>9 were marked and received into evidence.)</p> <p>10 JUDGE BARNETT: Dr. Marx, you may be</p> <p>11 excused.</p> <p>12 THE WITNESS: Thank you.</p> <p>13 JUDGE BARNETT: Thank you.</p> <p>14 MR. ZAKARIN: Housekeeping?</p> <p>15 JUDGE BARNETT: Oh, I love housekeeping.</p> <p>16 Mr. Zakarin.</p> <p>17 MR. ZAKARIN: I'm going back to it for a</p> <p>18 day.</p> <p>19 Last week, and it was pursuant to Your</p> <p>20 Honor's order, we had -- we designated portions of</p> <p>21 the record from 2008 relating to Mr. Quirk and Mr.</p> <p>22 Sheeran and provided that to the Services. And they</p> <p>23 were instructed to make their counterdesignations by</p> <p>24 today, which they have done.</p> <p>25 And we will, I think coordinate as to</p>

## OPEN SESSION

<p>5658</p> <p>1 whether this gets submitted to Your Honor as one, 2 you know, full designation along with the portions 3 of the testimony or whether it comes in separately. 4 I would hope it comes in just together with the 5 pages designated, but I will allow my colleagues to 6 work that out together with the Services. 7 JUDGE BARNETT: Thank you. 8 MR. ZAKARIN: I wanted to let you know we 9 will get that to Your Honors very quickly. 10 MR. WEIGENBERG: Right. And I think, 11 Your Honors, I suspect even if it comes in 12 separately, I have looked at what I believe, it 13 should be clear, and we will file it simultaneously. 14 I think it will be clear either way. 15 JUDGE BARNETT: Thank you. 16 MR. ZAKARIN: It is relatively confined, 17 happily. 18 JUDGE BARNETT: Thank you. Mr. Mancini? 19 MR. MANCINI: Your Honors, one other 20 housekeeping matter. I believe all counsel have 21 indicated that of the dates suggested by the Panel 22 for closing, that June 7th works for all counsel, if 23 that is still convenient for the Panel. 24 JUDGE BARNETT: That will work. 25 MR. MANCINI: Thank you.</p>	<p>5660</p> <p>1 JUDGE BARNETT: I doubt that the Services 2 are going to be willing to consolidate, but if they 3 are, all the better. If they are not, then, you 4 know, AM for Amazon, AP for Apple, et cetera, to 5 designate the paragraphs? 6 MR. SEMEL: Understood. The only thing I 7 would just add is just from our coordination side is 8 obviously if they are submitting five separate full 9 sets, which could be 500 pages each, and we're 10 submitting one set they are responding to one, it is 11 sort of a 25-fold increase of work and paperwork on 12 our side. 13 And -- 14 JUDGE STRICKLER: Well, five fold 15 increase. 16 MR. SEMEL: If they are splitting up ours 17 -- I guess it could be a five-fold or 25-fold thing 18 depending on how they coordinate their reply. 19 JUDGE STRICKLER: It is a lot more paper. 20 MR. SEMEL: It is a lot more paper. 21 JUDGE STRICKLER: Fair enough. 22 MR. SEMEL: That's why I thought that it 23 would be -- partly for Your Honors, that it could be 24 5- or 7,000 pages if we have to respond to full sets . 25 of each.</p>
<p>5659</p> <p>1 MR. SEMEL: Just because I didn't want to 2 get left out of the housekeeping, you had indicated, 3 Your Honor, the other day with regard to the 4 findings of fact and conclusions of law the idea 5 that reply briefs should be numbered to match, which 6 I think is a great idea. 7 We began talking with the Services and 8 will continue, but it occurs to me that Your Honors' 9 preferences on this are probably something we should 10 know upfront. 11 Our concern is with receiving five 12 different sets that we would have to respond to with 13 five -- and the coordination. So our preference is 14 for a consolidated set of numbered findings of fact 15 and conclusions of law from one side and obviously 16 we would provide that to match. 17 We will continue talking with them about 18 their preferences, but I thought I would raise it in 19 case Your Honors know what you want and would tell 20 us. 21 JUDGE BARNETT: It occurred to me that we 22 would have many on one side and one on the other, 23 and we would probably have more than one paragraph 24 1, et cetera. 25 MR. SEMEL: If I might --</p>	<p>5661</p> <p>1 JUDGE BARNETT: This is a very complex 2 case with lots -- I mean, all of these rate-setting 3 cases are complicated. And there are lots of issues 4 to be covered, but in my humble opinion, if anybody 5 is handing in 500 pages of proposed findings and 6 conclusions, they are risking me not looking at 7 them. I mean, seriously. That's outside the realm 8 of reality. 9 But with regard to the coordination, I 10 think it would be delightful. And we would like it. 11 Let me talk with my colleagues and see if we will 12 order it or if we will just encourage it. 13 JUDGE STRICKLER: Did you have some idea, 14 Mr. Semel, as to how to make your life easier with 15 regard to that, if they don't can combine their 16 proposed findings? 17 MR. SEMEL: I guess our initial thought 18 would be that at a minimum it would be a 19 consolidated numerical number, so that we don't have 20 overlapping numbers. We would hope that they would 21 also coordinate a central, since they put in joint 22 witnesses and joint exhibit list, they would 23 coordinate a joint section as well, so we're not 24 getting literally five sets of the same findings of 25 fact.</p>

## OPEN SESSION

<p>5662</p> <p>1 And then beyond that, I would expect or 2 hope Your Honors would be okay with us, if that 3 worse case scenario happens, and we wind up with 4 five sets of almost identical findings of fact that 5 we would do sort of see A, see B, rather than have 6 Your Honors have to reread our replies for each one. 7 Again, now we're treading on an area that 8 I think you probably have as much of a care about as 9 we do. Whether we are cut and pasting the same 10 response five times that you have to read five times 11 or whether you would rather see us reference you to 12 a master list. 13 My preference would be consolidate on 14 their side, consolidate on our side and answer. 15 JUDGE STRICKLER: Have you talked to them 16 about this yet or no? 17 MR. SEMEL: We did. We began the 18 conversation. I just wanted to raise it because I 19 was -- why spend our time coordinating if you are 20 going to tell us what you want. But we will 21 continue to talk. 22 JUDGE BARNETT: Mr. Marks? 23 MR. MARKS: Let me just offer Pandora's 24 position, which is that we will -- we oppose any 25 requirement that we consolidate our post-trial</p>	<p>5664</p> <p>1 rest of it, we will have to talk, obviously. 2 MR. ASSMUS: In case the record is not 3 clear, I will just start, Spotify likewise objects 4 to any order requiring consolidation. The 5 coordination cost, the differences in proposals as 6 they may evolve, just even client signoff becomes 7 really impossible with respect to a coordinated 8 filing. Even for the ones we have done on joint 9 witnesses, it has been difficult. 10 JUDGE BARNETT: Understood. 11 MR. ELKIN: Amazon concurs. 12 MR. STEINTHAL: We do too. 13 MS. MAZZELLO: Apple as well, if anyone 14 wanted it. 15 JUDGE BARNETT: Got it. Speaking of five 16 to one. 17 JUDGE FEDER: I think we're expecting 18 some briefing from you, am I right on that? I seem 19 to recall that we're expecting some briefing on a 20 few issues? Am I correct on that understanding or 21 am I hallucinating? 22 MR. SEMEL: I will say we intend at the 23 end of this, we were going to work on it this 24 weekend, we intend to get you some brief briefing on 25 some evidentiary issues that have been raised and we</p>
<p>5663</p> <p>1 findings with any of the other Services. To the 2 extent that we do have some joint witnesses with 3 others, of course we will try to economize, and we 4 all have some interest in economizing, but some of 5 the witnesses are sponsored by some groups of us, 6 some are by a broader group of us, and many are 7 different. We have differences in our proposals, 8 and the like. 9 I think we will all coordinate to the 10 extent that we can, and to the extent it is 11 appropriate, but that I doubt that Mr. Semel is 12 talking -- we would oppose any requirement that we 13 coordinate, but we will minimize the burden on 14 ourselves and on the Panel. 15 JUDGE BARNETT: What I can say is there 16 is no need for anybody to cite as a finding of fact 17 that, you know, the current regs were adopted by 18 agreement in 2012 or any of the -- I mean, really. 19 We know all that stuff. 20 The facts need to relate simply to the 21 evidence presented in this proceeding. We don't 22 need you to cite the statute to us as a finding of 23 fact or a conclusion of law. Get to the meat of it. 24 MR. MARKS: Understood, Your Honor. 25 JUDGE BARNETT: But with regard to the</p>	<p>5665</p> <p>1 will keep it as tight as we can. 2 MR. ZAKARIN: Maybe I was wrong. I 3 thought maybe what you may have been referring to is 4 the issue related to the Spotify/UMG contract. 5 Unless I was wrong, and on that you wanted, there 6 was going to be a letter brief coming in to -- I 7 think one came yesterday, yours, and ours either has 8 gone in or is going in today. 9 JUDGE FEDER: That was one I think we 10 were also going to get something relating to the 11 data that came in. 12 MR. SEMEL: Yes, that's the motion. This 13 weekend we're going to work on that and get that to 14 you. 15 MR. MANCINI: The only thing I would add 16 to that, Your Honors, I believe we were going to 17 meet and confer on a schedule for that. We haven't 18 heard what that schedule is. 19 MR. SEMEL: We will figure it out. 20 JUDGE BARNETT: Thank you. Is there 21 anything else we can do today? Any witnesses we can 22 call? Anybody know how to adjust the temperature in 23 the room? We can work on that. 24 Okay. Thank you all. We will be at 25 recess. Wait. Mr. Steinthal?</p>

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MR. STEINTHAL: One other housekeeping, I

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suppose. When can we expect, if we're going to get

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it, the rulings on the motions in limine, simply

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because that will impact how we brief things? So

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just wanted to raise that.

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JUDGE BARNETT: We're going to talk about

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how we're going to split up that workload as well as

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some other things that are sitting in our offices in

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other matters that needs to be addressed.

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MR. ASSMUS: There are other matters?

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JUDGE BARNETT: Did you say there are no

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other matters?

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MR. ASSMUS: There are other matters?

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JUDGE BARNETT: Yeah, minor things. So

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our hope is sooner rather than later. I can't give

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you a date. They are under advisement.

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MR. STEINTHAL: Understood.

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JUDGE BARNETT: Thank you. We are at

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recess until 9:00 clock Monday morning -- no, sorry,

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9:00 o'clock Wednesday morning.

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(Whereupon, at 2:26 p.m., the hearing

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recessed, to reconvene at 9:00 a.m. on Wednesday,

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April 12, 2017.)

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EXHIBIT NO:

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CONFIDENTIAL SESSIONS: 5486-5557,

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